Supreme Court, U.S.
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No. 94-1498

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

v.

MANUEL SALAZAR,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Illinois

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REASONS FOR DENYING THE WRIT

THE HOLDING OF THE ILLINOIS SUPREME COURT THAT RESPONDENT MANUEL SALAZAR WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL IN NO WAY CONFLICTS WITH THIS COURT'S OPINIONS IN LOCKHART v. FRETWELL AND STRICKLAND v. WASHINGTON.

Petitioner State of Illinois claims that the opinion of the Illinois Supreme Court below is in conflict with this Court's opinions in Lockhart v. Fretwell, 506 U.S. __, 122 L.Ed.2d 180 (1993) and Strickland v. Washington, 466 U.S. 668 (1984). That court held, on state post-conviction review, that Respondent Manuel Salazar had been deprived of the effective assistance of counsel in his direct appeal because his attorney had negligently failed to raise an issue upon which the court would have granted a new trial. This holding represents a straightforward application of controlling state and federal precedent. A fair reading of the opinion below reveals no conflict with either Lockhart or Strickland, and no basis for review by this Court on certiorari.

The Illinois Supreme Court held that counsel on direct appeal was ineffective for failing to argue that the murder/voluntary manslaughter instructions given at Respondent's capital murder trial were defective, as that court had earlier held in People v. Reddick, 123 Ill.2d 184, 526 N.E.2d 141 (1988). The court in Reddick found that the Illinois Pattern Jury Instructions on murder/voluntary manslaughter were contradictory, confusing, and in conflict with relevant provisions of the Illinois Criminal Code. The court found that these instructions indicated to jurors that as to the voluntary manslaughter charge, the prosecution had to prove the existence of a statutory mitigating mental state, which, as to the murder charge, the prosecution simultaneously contended did not exist. As a result, the instructions,

> (E)ssentially assure that, if the jury follows them, the jury cannot possibly convict a defendant of voluntary manslaughter. The reason is that even if a mitigating mental state is proved, it will have been proved by the defendant, not the People.
> Reddick, 526 N.E.2d at 145.

The Reddick court also noted that §3-2 of the Illinois Criminal Code (Ill. Rev. Stat., Ch. 38, §3-2) provided that if a defendant presented evidence of a mitigating mental state that would reduce a murder charge to voluntary manslaughter, then to sustain a murder conviction the prosecution had to disprove, beyond a reasonable doubt, the existence of that mental state. The Illinois murder/voluntary manslaughter instructions were further defective, and inconsistent with state law, by failing to place that burden on the prosecution. Reddick, 526 N.E.2d at 146.

Lastly, the Reddick court held that under applicable state procedural default rules, a defendant's failure to object to these defective instructions, to offer correct instructions, or to raise the issue in post-trial motions, did not result in default of the claim since the instructions involved "grave error." Not even the failure of a defendant to raise the issue on appeal would preclude the Illinois Supreme Court "from considering the correctness of those instructions on appeal and ordering new trials." 526 N.E.2d at 147.

Respondent Manuel Salazar's jury received the same murder/voluntary manslaughter instructions held defective in Reddick. Under Illinois law, had appellate counsel raised the instructional issue on direct appeal, Respondent would have been granted a new trial. Respondent's counsel, however, was admittedly unaware of the Reddick opinion, and failed to raise the issue in Respondent's direct appeal. As a result, Respondent's murder conviction and death sentence were affirmed by the Illinois Supreme Court. People v. Salazar, 126 Ill.2d 424, 535 N.E.2d 766 (1988).

In state post-conviction proceedings, Respondent asserted that he had been deprived of the effective assistance of counsel on direct appeal by his attorney's failure to raise the instructional error on which the Illinois Supreme Court had granted relief in Reddick. That court agreed, and reversed Respondent's conviction and remanded the case for a new trial. People v. Salazar,

162 Ill.2d 513, 643 N.E.2d 698 (1994). The Illinois Supreme Court's ruling represents a straightforward application of this Court's opinion in Strickland v. Washington, 466 U.S. 668 (1984), and of that court's opinion in People v. Caballero, 126 Ill.2d 248, 533 N.E.2d 1089 (1989), which adopted the Strickland test in evaluating counsel's effectiveness on direct appeal, i.e., whether counsel's failure to raise an issue on direct appeal was objectively unreasonable, and whether a reasonable probability exists that had the issue been raised, the outcome of the appeal would have been different. 533 N.E.2d at 1096.

The Illinois Supreme Court first concluded that counsel's failure to have raised the instructional issue on direct appeal was objectively unreasonable, as counsel "could not account for or explain his failure to bring to this court's attention an allegation that Reddick error had occurred during [Respondent's] trial." 643 N.E.2d at 703. The Court next concluded that Respondent had met the "prejudice" standard of Strickand by demonstrating that a reasonable probability existed that, but for appellate counsel's omission, the outcome of Respondent's direct appeal would have been different. 643 N.E.2d at 703-5.

In its petition for a writ of certiorari, the State of Illinois first argues that the Illinois Supreme Court's opinion is in conflict with Lockhart v. Fretwell, 506 U.S. __, 122 L.Ed.2d 180 (1993), because the court did not address whether the instructional error that appellate counsel failed to raise was of constitutional magnitude. This argument is meritless, however, for it overlooks the fact that the constitutional basis of Respondent's post-conviction claim was the deprivation of his state and federal right to the effective assistance of counsel on direct appeal. (U.S. Const., amends. VI & XIV; Ill. Const. 1970, art. I, §8.) See Evitts v. Lucey, 469 U.S. 387,

396-97 (1985); People v. Caballero, 126 Ill.2d 248, 533 N.E.2d 1089 (1989).[1]

It was unnecessary for the Illinois Supreme Court to determine, as a prerequisite to finding ineffective assistance of counsel, whether that instructional error was of constitutional magnitude. It is well established that an attorney may be constitutionally ineffective for failure to adequately protect his or her client's rights under applicable state statutes, rules, or case law. See, e.g., Gray v. Lynn, 6 F.3d 265 (5th Cir. 1993) (Counsel held ineffective for failing to object to an erroneous jury instruction that misstated the mental state applicable to Louisiana's attempt murder statute.); Prichard v. Lockhart, 990 F.2d 352 (8th Cir. 1993) (Counsel held ineffective for failing to object to use of an out-of-state marijuana conviction to enhance defendant's sentence for marijuana possession, in violation of an Arkansas sentencing statute.); People v. Wilson, 149 Ill.App.3d 1075, 501 N.E.2d 863 (1st Dist. 1986) (Counsel held ineffective for failing to utilize a state law allowing admission of prior inconsistent statements as substantive evidence.) People v. Alcazar, 173 Ill.App.3d 344, 527 N.E.2d 325 (1st Dist. 1988) (Counsel held ineffective for failing to assert a state speedy trial statute as a bar to prosecution.); People v. Sagstetter, 177 Ill.App.3d 982, 532 N.E.2d 1029 (2nd Dist. 1988) (Counsel held ineffective for failing to assert a state statutory client-therapist privilege.)

Despite the State's argument, Lockhart v. Fretwell, 506 U.S. __, 122 L.Ed.2d 180 (1993) has no application to the present case. Fretwell held only that counsel's failure to make an objection that would have been supported by a decision which was subsequently overruled does not result in "prejudice" within the meaning of Strickland v. Washington, 466 U.S. 668 (1984). The Fretwell Court reasoned that,

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[1] Under the Illinois Constitution, a defendant sentenced to death is entitled to a direct appeal to the Illinois Supreme Court as a matter of right. Ill. Const. 1970, art. VI, §4(b).

> (A)n analysis focussing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.
> Fretwell, 122 L.Ed.2d at 189.

Consistent with Fretwell, the Illinois Supreme Court expressly recognized in Respondent's post-conviction appeal that ineffective assistance of counsel would only be found where counsel's representation,

> ...fell below an objectively reasonable standard of competence and where the deficiencies in counsel's representation prejudiced the defendant's defense at trial such that the defendant was deprived of a fundamentally fair trial.
> People v. Salazar, 643 N.E.2d at 412.

Had the Illinois Supreme Court subsequently overruled its decision in People v. Reddick that Illinois' murder/voluntary manslaughter instructions were defective, then Fretwell might require a different result here. But, that is not the case. The rule of Reddick remains the law in Illinois.

The proceedings against Respondent Manuel Salazar were fundamentally unfair and produced an unreliable result. The Illinois Supreme Court correctly held that Respondent therefore met the requirements of the "prejudice" prong of Strickland.

Petitioner State of Illinois next urges that certiorari be granted on the ground that the Illinois Supreme Court misapplied the "prejudice" prong of Strickland, by improperly placing the burden on the State to establish that appellate counsel's omission was harmless beyond a reasonable doubt, rather than placing the burden on Respondent to show that the outcome of his appeal would probably have been different had counsel raised the issue of the defective jury instructions. The State's argument, however, is based on a misunderstanding of the reasoning of

the Illinois Supreme Court, which is in complete compliance with the standards set forth in Strickland, and in that court's opinion in People v. Caballero, 126 Ill.2d 248, 533 N.E.2d 1089 (1989) which adopted the Strickland test in evaluating an attorney's effectiveness on direct appeal.

The "prejudice" prong of Strickland required that Respondent demonstrate that the outcome of his direct appeal would probably have been different had counsel raised the defective jury instructions issue. The Illinois Supreme Court correctly recognized, however, that even if counsel had raised the issue on direct appeal, the outcome would not have been different if the State established that the error was harmless beyond a reasonable doubt. See People v. Shields, 143 Ill.2d 435, 445, 575 N.E.2d 538 (1991) (Holding that the instructional error described in Reddick is not per se reversible error, but is subject to a harmless error analysis). Therefore, as a necessary part of its Strickland analysis, the Illinois Supreme Court was required to first determine whether the instructional error at Respondent's trial was harmless beyond a reasonable doubt. Only if the answer to this question was negative would the outcome of Respondent's direct appeal have been different. Therefore, a finding that the instructional error in Respondent's case was not harmless beyond a reasonable doubt was a necessary element of the Illinois Supreme Court's analysis of whether the "prejudice" standard of Strickland had been satisfied.

Moreover, despite the State's assertion to the contrary, nowhere in its opinion below does the Illinois Supreme Court place the burden on the State to establish, in this post-conviction proceeding, that the instructional error was harmless beyond a reasonable doubt. Rather, the opinion simply points out -- accurately -- that had the instructional issue been raised on direct appeal, Respondent would have prevailed unless the State met its burden (in that direct appeal) to establish that the error was harmless beyond a reasonable doubt. In its opinion below, the court recognized that it is Respondent's burden to establish prejudice under Strickland, and merely

rejected the State's argument that Respondent failed to meet this burden because, according to the State, the record establishes that the instructional error was, as a matter of law, harmless beyond a reasonable doubt. Salazar, 643 N.E.2d at 412-13.

The controlling point in the present case is that the Illinois Supreme Court decided that, had the instructional error been brought to their attention in Respondent's direct appeal, that court would have granted Respondent a new trial on the ground that a properly instructed jury could have returned a voluntary manslaughter verdict. See Salazar, 643 N.E.2d at 513. As Illinois Supreme Court Chief Justice Bilandic noted in his concurrence below,

> Reddick was a significant opinion in the field of criminal law. Defendant's appellate counsel was not even aware of its existence. Had he been aware of Reddick and cited it, this court probably would have granted a new trial as it did in similar cases at that time. [citation omitted] In addition, the prosecution remained silent on the Reddick issue and this court did not raise it sua sponte. All of these circumstances persuade me to give the defendant a new trial. Salazar 643 N.E.2d at 416. (Bilandic, C.J., concurring)

The careful analysis undertaken by the Illinois Supreme Court in Respondent's post-conviction appeal makes clear that the court was aware of, and correctly applied, the Strickland "prejudice" standard in concluding that Respondent was deprived of his constitutional right to the effective assistance of counsel in his direct appeal.[2] Despite the State's argument, the opinion of the Illinois Supreme Court below in no way conflicts with this Court's opinions in Lockhart v. Fretwell and Strickland v. Washington.

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[2] Moreover, even in the absence of any constitutional deprivation, the Illinois Supreme Court possesses the supervisory authority to grant relief in state post-conviction proceedings. See e.g. People v. Davis, 156 Ill.2d 149, 619 N.E.2d 750, 756 (1993).

CONCLUSION

For the foregoing reasons, Respondent Manuel Salazar respectfully requests that the petition for writ of certiorari filed by the State of Illinois be denied.

Respectfully submitted,

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